Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petition for Waiver and/or Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement	)	

OPPOSITION OF VISALUS, INC.
TO PETITION FOR RECONSIDERATION

ViSalus, Inc. ("ViSalus"), by its attorneys and under Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), hereby opposes the Petition for Reconsideration in Non-Rulemaking Proceeding filed by Ms. Lori Wakefield in the captioned proceeding.[1] Even a cursory review of the Petition reveals that Ms. Wakefield has failed to substantiate any justification for reconsideration of the Commission's grant of a limited waiver of the prior express written consent rules to ViSalus.[2] The Petition is a naked attempt to embroil the Commission in private litigation in contravention of the Commission's long-standing policy against interjecting itself in such matters. In any event, Ms. Wakefield lacks standing to petition

[1] *See* Petition for Reconsideration In Non-Rulemaking Proceeding, CG Docket No. 02-278 (filed July 15, 2019) (the "Petition").

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petitions for Waiver and/or Retroactive Waiver of 47 C.F.R. § 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement;* CG Docket No. 02-278, Order, DA 19-562 (rel. June 13, 2019) (the "*Order*").

for reconsideration under Section 1.106(b)(1) of the Commission's rules. The Commission should summarily deny the Petition.

In September 2017, ViSalus filed its petition for waiver of 47 C.F.R. § 64.1200(a)(2), (a)(3), and (f)(8) "for all telephone calls that Visalus made using a prerecorded message or artificial voice, or autodialer, from October 16, 2013 through October 2, 2015" for which the company had obtained prior written express consent before October 16, 2013.[3] In its Waiver Petition, ViSalus referred to the litigation then pending against it in the District Court in Oregon, brought two years earlier by the same individual and counsel that have filed this Petition.[4] The Commission sought comment on ViSalus's Petition in June 2018[5] and received no comments from the public, including from the law firm then pressing claims against ViSalus in Oregon or from Ms. Wakefield.[6] The Commission then granted this retroactive waiver in light of the industry-wide confusion regarding the Commission's prior express consent rules before it clarified the rules in 2015 and consistent with its grant of similar waivers.[7] In doing so, the Commission made clear that this waiver applies *only* "to calls for which [ViSalus] had obtained some form of *written* consent."[8]

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[3] Petition for Retroactive Waiver; Request for Expedited Ruling, CG Docket No. 02-278, at 8 (filed Sept. 14, 2017) (the "Waiver Petition").

[4] *Id.* at 2-3.

[5] *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed by ViSalus, Inc. Under the Telephone Consumer Protection Act*, CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018).

[6] *See Order* ¶ 8.

[7] *See id.* ¶ 1.

[8] *Id.* (emphasis in original); *see also id.* ¶ 11 ("We emphasize that these waivers do not apply to calls for which there was not some form of *written* consent previously obtained prior to the 2012 rule changes.") (emphasis in original).

Ms. Wakefield argues that the Commission erred in granting this waiver because ViSalus is not similarly situated to the other entities that have received similar waivers.[9] First, Ms. Wakefield alleges that, in her own ongoing litigation against ViSalus in *Wakefield v. ViSalus, Inc.*, No. 3:15cv01857-BR (D. Or.), ViSalus has failed to prove that it had sufficient consent to make marketing calls using prerecorded messages or an artificial voice.[10] Ms. Wakefield argues that this lack of proof distinguishes ViSalus from other entities that received waivers, thereby undermining the basis for granting the similar waiver to ViSalus.[11]

Ms. Wakefield is simply incorrect. ViSalus is no different than the other nine entities that sought and were granted similar waivers as provided in the *Order*. Based on its written consents, ViSalus made the same exact request for a waiver of the same duration and based on the same lack of clarity the Commission had recognized in granting the previous nine petitions.[12] Moreover, in granting the previous waivers, the Commission did not require "proof of actual confusion" before acknowledging the confusion that resulted from the Commission's TCPA orders.[13] Thus, any alleged "failure of proof"—of which there is none—in the district court litigation has no bearing on the whether ViSalus was similarly situated to the other petitioners that received identical waivers and therefore qualified for the waiver.

Second, Petitioner's contention fundamentally misconstrues the scope and extent of the Commission's waiver grant. As the Commission made clear, the waiver applies only "to calls

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[9] Petition at 5.

[10] *Id.*

[11] *Id.*

[12] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015); *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 31 FCC Rcd 11643, 11645 (2016).

[13] Waiver Petition at 7.

for which [ViSalus] had obtained some form of *written* consent."[14] Conversely, calls for which ViSalus *had not* secured written consent are *not* covered by the waiver. In other words, the Commission anticipated the issue Ms. Wakefield is raising and crafted the waiver in a way that rendered that question moot. Thus, the ongoing litigation over whether ViSalus had sufficient consent to make prerecorded marketing calls to Ms. Wakefield has no bearing on the validity of the Commission's ruling granting a waiver.

In addition, Ms. Wakefield alleges that evidence presented at trial in *Wakefield v. ViSalus* demonstrates that ViSalus was under no "genuine confusion about the scope or applicability of the Commission's rules."[15] This is untrue and irrelevant. The question whether ViSalus was confused is not at issue in the district court litigation. More to the point, the question of confusion was conclusively resolved by the *Commission itself*, when it granted identical waivers as that sought by ViSalus based on the confusion caused by its own rule changes. This argument should have no bearing on the lawfulness of the Commission's waiver grant. As the Commission made clear, the waiver was warranted because parties "*could* have been confused as to whether written consent obtained previously would remain valid after the new rules became effective,"[16] given that the rules "could reasonably have been interpreted to mean that written consent obtained prior to the *2012 TCPA Order* was still valid."[17] The Commission did not require proof of "genuine confusion," as Ms. Wakefield suggests.[18] The Commission's waivers

[14] *See supra* note 8.

[15] Petition at 5.

[16] *Order* ¶ 5.

[17] *Id.* ¶ 6.

[18] *See Order* ¶ 6 ("Finally, just as the Commission *did not require proof of actual confusion* for the DMA or the Coalition, the Bureau *did not require proof of actual confusion* from the seven petitioners granted waivers in October 2016.") (emphasis added).

instead were premised on the agency's acknowledgment that the rules as written were unclear and strict enforcement would be unfair. Thus, whether evidence in *Wakefield v. ViSalus* does or does not show genuine confusion on the part of ViSalus has no bearing on the waiver grant.

In short, the Petition fails to substantiate any justification for reconsideration of the *Order.* The Petition instead invites the Commission to involve itself in legal issues that are being adjudicated in the federal district court of Oregon. It is well settled, however, that the Commission must proceed with restraint and respect for legal processes underway in other fora, and accordingly the Commission has a longstanding policy of refusing to interject itself into private disputes.[19] The Commission should not deviate from that policy here.

Additionally, the Commission should dismiss the Petition because Ms. Wakefield lacks standing under Section 1.106(b)(1), which provides that a petition for reconsideration may be filed only by a "party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission. . . ."[20] Ms. Wakefield was not party to the proceeding nor does the Commission's waiver grant adversely affect her interests. In fact, Ms. Wakefield herself acknowledges that the Commission's waiver grant "would be of no moment to her claim."[21]

Ms. Wakefield tries to avoid this failure by pointing out that ViSalus has raised the *Order* as a bar to certain forms of relief in her action.[22] But this is merely a question of the weight and

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[19] *See Listeners Guild v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (citing *Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42 (1975), *Carnegie Broadcasting Co.*, 5 FCC2d 882, 884 (1966), *Transcontinental Television Corp.*, 44 FCC 2451, 2461 (1961)); *see also Decatur Telecasting, Inc.,* 7 FCC Rcd 8622, 8624 (1992) (citing *John F. Runner, Receiver (KBIF),* 36 Rad. Reg. 2d 773, 778 (1976)); *Metromedia, Inc.*, 3 FCC Rcd 595 (1988).

[20] 47 C.F.R. § 1.106(b)(1).

[21] Petition at 1, n.5.

[22] *Id.*

interpretation the Court will give to the *Order*; it is not an adverse effect of the action taken by the Commission. The Commission should decline to interfere in the Court's proceedings and conclude that Ms. Wakefield lacks standing. In addition, Ms. Wakefield and her counsel filed their lawsuit against ViSalus in October 2015, two years before ViSalus filed its Waiver Petition. They had every opportunity to participate in this proceeding before the Commission at an earlier stage, but chose not to.[23]

For these reasons, the Commission should summarily deny the Petition.

Respectfully submitted,

VISALUS, INC.

By: */s/ Bryan N. Tramont*
Bryan N. Tramont
Jennifer Tatel
Joshua M. Bercu

Wilkinson Barker Knauer, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 383-3344

Its Counsel

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[23] 47 C.F.R. § 1.106(b)(1).